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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 676

FRANKLIN EDWARD KAMENY, *Petitioner*

v.

WILBER M. BRUCKER, Secretary of the Army, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Franklin Edward Kameny prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on August 31, 1960.

OPINIONS BELOW

The U. S. District Court for the District of Columbia rendered no opinion. Its judgment appears in the Appendix hereto, *infra*, p. 1a.

The original opinion of the Court of Appeals, dated June 23, 1960 is reported at 282 F. 2d 823 (D.C. Cir. 1960), and appears in the Appendix hereto, *infra*, pp. 1a-3a.

A motion for rehearing was denied without opinion on August 31, 1960.

JURISDICTION

The order denying the rehearing was entered on August 31, 1960, and appears in the Appendix hereto, *infra*, p. 4a.

An extension to January 28, 1961 of the time within which to petition for a writ of certiorari was granted on November 18, 1960.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Should the Court of Appeals be directed to decide the question of whether the Civil Service Commission decision disqualifying petitioner from Federal employment for immoral conduct, on the ground that petitioner was suspected of being a homosexual, is factually, procedurally, legally, and constitutionally valid.

2. Should the Court of Appeals be directed to review upon grounds of fact and substance, the Army Map Service's decision discharging petitioner from its employment for falsification.

STATUTES INVOLVED

Army Civilian Personnel Regulation E2 (see Exhibit No. 6 in Joint Appendix, pp. 13-14).

Title 5, United States Code, Sections 631, 632, provides in pertinent part:

> § 631. Regulation of admissions to Civil Service.
>
> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch

of the service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

§ 632. Civil Service Commission; * * *

The president is authorized to appoint, by and with the advice and consent of the Senate, three persons, * * *, as civil service commissioners, and said three commissioners shall constitute the United States Civil Service Commission.

Executive Order 10577, as amended, (5 U.S.C. (Supp. V) 631; 5 F.C.R. 05.1, 05.2) provides in pertinent part:

5.1 Regulations

(a) The Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

* * * * *

5.2 Authority of the Commission to Make Investigation.

The Commission may make appropriate investigations to secure enforcement of the Civil Service Act, Rules and Regulations, including investigations of the qualifications and suitability of applicants for positions in the competitive service. It may require appointments to be made subject to investigation to enable the Commission to determine, after appointment, that the requirements of law or the Civil Service Rules and Regulations have been met. Whenever the Commission finds that an employee serving under

such an appointment is disqualified for Federal employment, it may instruct the agency to remove him, or to suspend him pending an appeal from the Commission's finding; *Provided*, That when an agency removes or suspends an employee pursuant to the Commission's instructions, and the Commission, on the basis of new evidence or on appeal, subsequently reverses the initial decision as to the employee's qualifications and suitability, the agency shall, upon request of the Commission, restore the employee to duty.

The pertinent sections and parts of section of Title 5 of the Code of Federal Regulations provide:

§ 2.106 *Disqualifications of applicants* — (a) *Grounds for disqualification.* An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons: * * *

(3) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;

(4) Intentional false statements or deception or fraud in examination or appointment.

* * * * *

(8) Any legal or other disqualification which makes the applicant unfit for service.

(b) *Debarment.* A person disqualified for any of the reasons listed in paragraph (a) of this section may, in the discretion of the Commission be denied examination, or denied appointment to any competitive position, for a period of not more than three (3) years from the date of the determination of such disqualification. Upon expiration of the period of debarment the person who has been debarred shall not be appointed to any position in the competitive service until his fitness for appointment shall have been determined by the Commission.

§ 2.107 *Appointments subject to investigation.* (a) All types of appointments under the regulations in this chapter * * * shall be subject to investigations by the Commission to establish the appointee's qualifications and suitability for employment in the competitive service.

(b) Except in cases under 2.106(a)(4) involving intentional false statements, or deception or fraud in examination or appointment, the condition "subject to investigation" shall expire automatically at the end of one year after the effective date of the appointment.

§ 2.302 (a) *Pending establishment of a register.* When there are insufficient eligibles on a register appropriate for filling a vacancy in a continuing position (one that will last longer than a year) and the public interest requires that the vacancy be filled before eligibles can be certified, the Commission may authorize the agency to fill the vacancy by temporary appointment pending establishment of a register. Such appointment shall continue only for such period as may be necessary to make appointment through certification.

* * * * *

(b) *Standards.* In making temporary appointments under this section, the agency shall determine that the applicant meets the qualification standards issued by the Commission and that he is not disqualified for any of the reasons listed in § 2.106.

* * * * *

§ 9.104 *Procedure in separating temporary employees.* (a) An employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer.

STATEMENT

This is an action, brought by petitioner, an Astronomer, to compel the Secretary of the Army to reinstate him in the position as Astronomer with the Army Map Service, from which he was dismissed on December 20, 1957, and to compel the Civil Service Commission to revoke its action of January 15, 1958, barring him from Federal employment.

The jurisdiction of the District Court was invoked under 28 U.S.C. 1331, 1332, 2201 and 2202; 5 U.S.C. 22-1 and 1009 and Sections 11-305 and 306 of the District of Columbia Code.

Petitioner was hired by the Army Map Service on July 15, 1957, as an Astronomer, Grade GS-9. In applying for this position, he filled out the Government Form 57 (Application for Federal Employment). Questions 33 on this form asks:

> 33. Have you ever been arrested, charged, or held by Federal, State, or other law enforcement authorities for any violation of any Federal law, State law, a county or municipal law, regulation or ordinance? Do not include anything that happened before your 16th birthday. Do not include traffic violations for which a fine of $25 or less was imposed. All other charges must be included even if they were dismissed. If your answer is "yes", give in Item Number 34 for each case, (1) approximate date, (2) charge, (3) place, (4) action taken.

Petitioner responded to question 33 by indicating that the answer was "yes" and to 34 by:

> "August 1956; Disorderly conduct; San Francisco; not guilty; charge dismissed." (See Exhibit 10, pp. 15-16, of the Joint Appendix, hereafter cited as "JA"; and of the Certified Record, hereafter cited as "CR")

The arrest referred to, occurred on August [redacted] 1956, while petitioner was briefly in the San Francisco area attending and delivering a paper at a meeting of the American Astronomical Society. The arrest occurred when petitioner, while in a public men's room, and without invitation or solicitation on his part, and without sexual response, had his penis momentarily touched by another man there. The contact was immediately repelled and terminated by petitioner. The incident was witnessed by two police plainclothesmen, observing through a ventilation grill-work. Petitioner was in process of departing from the men's room, alone, when the arrest occurred. In the course of the arrest and booking, petitioner was told by police officers that if his plea were "Guilty", the matter would be quickly disposed of; if "Not Guilty", that he would probably have to remain in the San Francisco area for another week. This petitioner could not do, and so, at the trial the following morning, for much the same reasons of expediency as those for which the average citizen will almost always plead guilty to a traffic violation, regardless of circumstances, petitioner entered a plea of "Guilty", was fined $50.00, and placed under probation for 6 months.

Immediately subsequent to the trial, the probation officer informed petitioner that at the termination of his period of probation, he might apply to the court under Section 1203.4 of the California Penal Code, under which:

> "Every defendant who has fulfilled the conditions of his probation * * * shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty * * * and * * * the court shall thereupon dismiss the accusations or information against such defendant, who

> shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. * * *"

In response to repeated and reiterated questions by petitioner, the probation officer informed petitioner clearly and unambiguously that after such action had been taken by the court, he could, thereafter, without fear of accusation of falsification, deception, perjury, or misrepresentation, declare that the plea and verdict were: Not guilty, charge dismissed. Petitioner took the probation officer at his word, and still does.

Pursuant to petitioner's application, the Municipal Court of California for San Francisco, on March 12, 1957, ordered that:

> "* * * the period of probation be terminated in the above entitled case, that the plea or verdict of guilty be set aside and a plea of not guilty be entered, and that the information or complaint be dismissed."

Petitioner was informed of this in a document which bore, as its designation of the charge involved, no title, but only "215 MPC". (Ex. 2, JA, p. 9) The correct title of the charge (Lewd and Indecent Acts) had been mentioned in petitioner's presence only once, in the court room, under conditions of great stress; he had neither written record nor memory of it.

Accordingly, in answering Question 34 on the Form 57, and interpreting "charge" as meaning a request for a descriptive title, as distinguished, in his mind, from a number or other such anonymous designation, petitioner wrote what he felt was probably the correct title, and which is the title frequently given to the charge in such cases in the District of Columbia and

in many other places. Under "action taken", in accordance with the advice of the probation officer, and in consequence of the court order, he correctly wrote: "Not Guilty; Charge Dismissed." Were he filling out that form again today, almost four years and an accusation of falsification later, he would consider it correct to give the same response, again, to "action taken".

It will be noted that no attempt was made by him to conceal the fact of the arrest, and that information was given which could and did lead those interested directly to the official record of the arrest.

On November 26, and December 5, 1957, petitioner was interrogated by Civil Service Commission investigators. Among other questions, he was asked (JA and CR, pp. 24 and 28):

> "Information has come to the attention of the U.S. Civil Service Commission that you are a homosexual. What comment, if any, do you care to make?
>
> "What and when was the last [sexual] activity in which you participated
>
> "* * * have you engaged actively or passively in any oral act of coition, anal intercourse or mutual masturbation with another person of the same sex."

Details of the alleged "information" about petitioner's homosexuality being refused him by the investigators, he replied to this question that:

> "I have no comment. It is impossible to offer intelligent or meaningful comment without knowledge of the details of the information."

In response to all three of the questions, he gave answers indicating that he felt that these were matters

of his own personal life, having no connection with the government and having no relation to his performance at the position for which he was hired, and therefore no proper business or concern of the agency, of the Civil Service Commission, or of the government and on that account, on principle, he must refuse to answer them.

On December 10, 1957, petitioner was presented with a letter from the Commanding Officer of the Map Service, indicating his desire to dismiss petitioner for falsification of the Form 57, specifically in regard to his answers to Question 33's request for the name of the charge and the action taken. Petitioner replied, on December 12, 1957, refuting the charges. (Ex. 1, JA, p. 7, and Ex. 3, JA, pp. 10-12)

On December 20, 1957, petitioner was dismissed from the Army Map Service, ostensibly upon charges of falsification, but actually upon grounds of his alleged homosexuality (See substantiation under "Reasons for Granting the Writ", below). He orally requested a hearing. This took place, on about 20-minutes notice, on December 23, 1957, before the Commanding Officer and the Chief Personnel Officer of the Map Service. Over 50% of the hearing was devoted not to the charges of falsification at issue, but to the allegations of petitioner's homosexuality. Petitioner then submitted a formal, written appeal to the Map Service. On March 12, 1958, the Map Service affirmed its own judgment, as might well have been expected, since the same two men—the Commanding Officer, and the Chief Personnel Officer of the Map Service—were, in effect, accusers, prosecutors, hearing court, judge, jury, and appeals court. (Ex. 4, JA pp. 12-13, and Ex. 9, JA, pp. 14-15)

Petitioner appealed, informally, up to the Office of the Secretary of the Army, where he was told that their "hands were tied" by the Civil Service action of January 15, 1958 (see immediately below), but that, could that be reversed, they would re-examine the Map Service's decision. In order that the matter not lapse, they suggested that a letter be written to the Commanding Officer of the Army Map Service, indicating petitioner's intention of keeping the matter open and alive. This was done on or about May 1, 1958.

Meanwhile, on January 15, 1958, the Civil Service Commission had declared petitioner unsuitable and ineligible for Federal employment, on grounds of immoral conduct (not further specified) in a letter which stated that petitioner had:

> "* * * refused to furnish a statement regarding your moral conduct". (JA, pp. 34-35)

thus implying that petitioner was considered guilty until proven innocent, rather than in reverse, as is usual in this country.

Petitioner appealed on February 14, 1958. The Commission upheld itself on March 17, 1958. (JA, pp. 33-34) Petitioner then decided that "if he were going to be hanged he was going to know what he was being hanged for". After repeated conversations with successively higher officials of the Commission's Investigations Division, and finally with the Executive Assistant to the Chairman of the Commission, he was told, by two officials separately, that there was no specific evidence against him, but that the Commission's decision had been based upon the San Francisco incident and upon "the tone and tenor, but not the gist and

substance" of petitioner's replies to the interrogators. Despite repeated and insistent attempts by petitioner, then and later, to obtain further information about the charges against him, this was denied him.

Petitioner then appealed to the Chairman of the Civil Service Commission, on March 30, 1958. On May 15, 1958, the Chairman affirmed the Commission's action, and on June 12, in response to a request of May 16, 1958, refused to reconsider his affirmation. (JA. pp 32 and 31)

Petitioner then engaged in correspondence on the matter with the then Civil Service Commission Chairman, Mr. Ellsworth, and his successor, Mr. Jones, until April, 1959. He appealed, informally, to President Eisenhower, and various White House staff members, and to various members of Congress, including the Chairmen of the House and Senate Civil Service Committees, all to no avail.

On June 16, 1959, the complaint initiating this case was filed in the U. S. District Court for the District of Columbia Circuit, alleging (1) that petitioner's answer to the Form 57 question was without intent to deceive; (2) that both decisions were, in fact, based upon mere suspicion of homosexuality, unsubstantiated by facts in the possession of the government; and (3) that petitioner had not received the procedural rights due him by statute and regulation. (JA, pp. 2-6)

Respondents filed a motion for Summary Judgment on the ground, basically, that the necessary forms, rites, rituals and ceremonies had been followed, and that the substance and basis for their action was not subject to adjudication by the courts; that it was not for the courts to look behind a decision to dismiss an applicant for Federal employment.

After a hearing on October 23, 1959, on the Summary Judgment motion, the motion was granted without opinion on December 23, 1959. Petitioner appealed, basing his appeal upon the assertion that two triable issues of fact existed; (1) Whether petitioner's answer was made without intent to deceive; and (2) Whether the Civil Service Commission had proper basis for its finding of immoral conduct. After a hearing on May 18, 1960, his appeal was rejected, *per curiam*, on the ground that (1): The Army Map Service had

> "* * * accorded to the appellant all procedural prerogatives required to be extended in the case of temporary appointees, and that valid regulations of the Civil Service Commission authorized appellant's separation from the service."

and (2), that:

> "Our decision on this aspect of the case makes it unnecessary for us to consider appellant's contentions with reference to the conclusions reached by the Civil Service Commission". (CR, pp. 42-44; Appendix hereto, *infra*, pp. 1a-3a)

Petitioner requested a rehearing, on the grounds that both actions against him were constitutionally invalid —that of the Army Map Service because it was arbitrarily against the evidence and the facts; that of the Civil Service Commission (and, in truth, that of the Map Service, as well) because it was based upon a personal discrimination so unjustifiable as to be violative of due process—and that the court had ruled upon neither of these. In regard to the court's express refusal to rule upon the Civil Service Commission's decision, appellant stated in his Petition for a Rehearing (CR, p. 48):

> "Appellant has claimed his liberty under law to compete for Government employment on the same

basis as other citizens of the United States. By his complaint in this action, appellant alleged facts to support his contention that he was discharged and disqualified not for any want of technical ability, nor for dishonesty in answering questions on his application form, but solely because he was suspected of homosexuality. By his prayers for relief, in his argument below, and in his brief and argument in this court, he has claimed his federally guaranteed right to be free from discrimination which, he submits, is no less illegal than discrimination based on religious or racial grounds."

The rehearing was denied, and the court's judgment affirmed, without opinion, on August 31, 1960. Petitioner appeals now to this court.

REASONS FOR GRANTING THE WRIT

PREAMBLE TO ARGUMENTS

(1) This case, involving matters never before examined by the courts, is one of extreme importance to a very large number of American citizens. A rough but probably fair estimate (see substantiation and elaboration under Argument 6 below) of the number of homosexuals in the United States, would have them making up 10% of our population at the very least—perhaps, at least some 15,000,000 people (after infants and young adolescents are omitted). This is a group comparable in size to the Negro minority in our country, and of roughly the same order of magnitude as the Catholic minority; a group some 2½ times the size of the country's Jewish minority, and comparable to the world's Jewish population. It is a group which, in this country, has borne and is bearing the brunt of a persecution and discrimination of a harshness and

ferocity at least as severe as that directed against these other minorities, but which persecution instead of being mitigated and ameliorated by the government's attitudes and practices, has instead been intensified by them; a persecution and discrimination not one whit more warranted or justified than those against Negroes, Jews, Catholics or other minority groups. This entire large group, broadly and completely heterogeneous as it is, and having in common among its members, physically, intellectually, socially, economically, and otherwise, nothing at all save their homosexuality itself, is barred, *in toto*, from Federal employment.

It is because the government's policies, particularly in the field of employment, are of such direct and personal concern to so large a minority, that this court is asked to direct that this case, involving, in large measure, a challenge to these policies, be given a full hearing in all of its aspects and ramifications.

(2) It has been argued, particularly in regard to the Army Map Service action, that the discretion of an appointing officer is not subject to adjudication; that as long as the prescribed rites, rituals, forms, and ceremonies of a dismissal are conformed to, the substance and ground of the discharge are not subject to examination by the courts. The courts have upheld this policy on several occasions. It is time that this policy be re-examined and that the realities of the consequences of this policy be looked at with a critical and jaundiced eye.

The government is not just another employer, and discharge from government employment is not discharge from just another job. Appointing officers are subject to all of the failings of other human beings, including, among others, prejudice, personal ambition,

submission to pressure by others, cowardice, emotion, and malice. Discharge from Federal employment, unlike other discharge, bears an official stamp, in the minds of the majority of citizens.

Petitioner has, by this discharge, and by this debarment been branded, publicly and (if they are not reversed) permanently, by the majesty of the United States Government, as a dishonest person, and as an immoral person, neither of which he is. And he has been so branded without a shred of fact to bear out the accusations, and, more important, without a chance to defend himself in an impartial hearing.

To say that the victims of actions of this sort, with all of the consequences of such actions, have no recourse in the courts, is monstrous! It is possible, by a stroke of the pen, for one fallible appointing officer, through error, pressure, malice, prejudice, or irresponsibility, to destroy an employee's reputation and his good name, his career and his profession, and to deprive him, often permanently, of his livelihood, with no recourse on his part. That such a state of affairs should be allowed to persist, upon no grounds other than that Federal employment is supposedly a privilege and not a right, seems intolerable. In a government such as ours, any government official should be able to be held accountable and responsible for any of his actions—and especially for those of his actions which are directed at and directly and personally affect, an individual citizen. That this is not so can lead to abuses of the worst sort—as in this case.

It would seem long overdue that the entire philosophy behind these policies of non-interference by the courts be re-examined.

(3) The Court of Appeals, in their opinion of June 23, 1960, stated, in regard to their decision on the Army Map Service's action, that:

> "Our decision on this aspect of the case makes it unnecessary for us to consider appellant's contention with reference to the conclusion reached by the Civil Service Commission." (CR, p. 43)

This is incorrect. A favorable decision on either count, alone, would grant petitioner a measure of relief and justice. A favorable decision on the Civil Service Commission's action would (1) remove an otherwise permanently disabling stigma from petitioner's record, and (2) allow petitioner to follow certain avenues of administrative recourse opened to him by the Office of the Secretary of the Army provided that the Civil Service debarment could be removed. It is thus proper and, in the interest of justice imperative, that the Civil Service Commission's action also be considered by the courts.

(4) Petitioner wishes to call explicitly to the attention of the Court that in the present proceedings, the Court is not, necessarily, being asked to decide any of the issues raised above or below. This is an appeal from respondents' motion for Summary Judgment, granted and affirmed by the lower courts. This court is asked, merely, to affirm that issues and questions of sufficient validity and gravity exist to warrant the granting of a full court hearing to the case in all of its aspects.

Petitioner's efforts to achieve justice have miscarried and have been thwarted by the refusal of the respondents and of the courts to face the pertinent issues squarely—for, in fact, to face them at all—and by their reliance upon technicalities and side-issues, indicative

either of a fundamental lack of sense of responsibility on these matters, or of a refusal to recognize their importance. It has become abundantly clear that as much as it is in the public interest that many questions and issues relating to homosexuality be dealt with by the government realistically, civilizedly, and directly, the government is not going to deal with these matters at all, in any fashion, (except by further attempts at repression) unless it is forced to do so. Therefore petitioner, in this petition, seeks to attack the problem at its roots and at its sources, by challenging (in part, and within the framework of the circumstances of this case) the propriety, the legality, and the constitutionality of the government's practices, procedures, and policies in regard to the employment of homosexuals.

For this purpose, it is necessary that, in a formal manner, both the respondents and the Court be instructed in regard to certain factual, sociological and other realities which the government stubbornly ignores, and of which the Court, certainly in a formal sense, through an almost total lack of previous cases, arguments, decisions, and precedents, is uninformed. This petition is, therefore, in part (particularly, but not entirely, in Argument 6) what has come to be known as a "Brandeis Brief" and, in its whole, will be of a somewhat less formal nature than such petitions usually are, and, perforce, somewhat longer.

In World War II, petitioner did not hesitate to fight the Germans, with bullets, in order to help preserve his rights and freedoms and liberties, and those of others. In 1960, it is ironically necessary that he fight the Americans, with words, in order to preserve, against a tyrannical government, some of those same rights,

freedoms and liberties, for himself and for others. He asks this court, by its granting of a writ of certiorari, to allow him to engage in that battle.

ARGUMENTS

(1) The Argument of Fact

(a) Petitioner has been declared unsuitable by the Civil Service Commission, upon grounds of immoral conduct. By statement of more than one Civil Service Commission official, the only bases for this accusation were (1) the incident in San Francisco and (2) "the tone and tenor, but not the gist and substance" of petitioner's remarks to the Civil Service Commission's interrogators (The phraseology quoted was orally submitted to, and was approved, verbatim, by the Commission officials in question, as summarizing, fairly, properly, and accurately, the basis for their action). (JA, pp. 39-40)

By basis (2) can only be meant (and this was clearly indicated to petitioner in his conversations with Commission officials) that the Civil Service Commission resented bitterly having been told by Petitioner, that in his view his personal life, during non-working hours, and also prior to the date of his employment, was no proper business or concern of his employer, of the government, of the agency, or of the Civil Service Commission. This leaves (a) the incident in San Francisco, and (b) the unproven assumption that petitioner is a homosexual as the only bases for the Commission's action.

The San Francisco incident is not proper basis for the Commission's action for several reasons. First, whatever the formal legal aspects of that situation may be, petitioner, as the object of an unexpected and unsolicited assault, was guilty of no immoral conduct here.

In point of fact, no immoral conduct occurred at all, on the part of either party to the incident, nor would it have been immoral even had petitioner solicited the assault. Illegal conduct (not an issue here) may conceivably have occurred, but not immoral conduct. *It is essential that, throughout this case, a sharp and clear distinction be made and maintained between immorality and illegality.* This distinction will be maintained throughout this petition.

Secondly, the incident occurred long before petitioner was hired or had ever applied for Federal employment. It was *not* one of a series of such incidents, but stood quite alone. It did not, therefore, indicate a continuing course of conduct which had led, or could have led to a series of such arrests.

However, in their "*Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment*", *U. S. District Court for the District of Columbia,* in the instant case, respondents state:

> "Debarment is part of the Commission's examining process * * *. Although it is a penalty, its primary purpose is to impose upon the individual a necessary period of rehabilitation before he is allowed to take examinations in or be appointed to the competitive service. * * * Debarment * * * precludes an individual from taking a civil service examination or being appointed, for a limited period of time, in the competitive civil service."

By this statement, respondents have volunteered, gratuitously, that the purpose of the three-year debarment period is not punishment or permanent exclusion, but rehabilitation. Rehabilitation, by the very nature of the concept, can apply only to a continuing condition or course of conduct, not to an isolated incident. Hence

the Commission's action cannot reasonably be based upon a single isolated incident occurring not during employment but before the commencement of employment, unless that incident is considered not in its own right, but as a manifestation of a continuing condition or state of affairs. In the present case, it is amply clear that the Commission considers the incident as an indication that petitioner is a homosexual.

It is the alleged state and practice of homosexuality, and not the San Francisco incident, per se, upon which the Commission bases its action. This will be examined in other arguments below.

Respondents contend (Brief, Court of Appeals, p. 18) that "the incident of appellant's arrest obviously furnished a basis for disqualification within the provisions of the regulation" (Civil Service Commission regulation 2.106 (a)(3)):

> "An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:—(3) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;"

Respondents are in error.

Only the phrase "immoral conduct" was invoked in the notice to petitioner of his debarment and ineligibility. As has been pointed out above, and as will be discussed below, directly and by implication, the arrest incident, and the circumstances related to it were not immoral in any aspect.

However, in order to scotch further argument, we will consider, item by item, and phrase by phrase, the remainder of the regulation, despite its non-applicability.

The final verdict and plea, despite the road by which they were arrived at, were "Not guilty". Hence there was no criminal conduct.

Dishonesty does not apply to the San Francisco incident.

The regulation specifies not merely disgraceful conduct (which did not occur), but notoriously disgraceful conduct. The regulation also specifies infamous conduct. The gravamen of both infamy and notoriety is widespread publicity. There was no publicity here at all. Hence the regulation is inapplicable to the San Francisco incident upon *all* of its counts.

Thus, factually, there is no evidence of immoral conduct. The San Francisco incident was not immoral, and, in any case, cannot, standing alone, prior to employment, be used as a basis for ineligibility. By statement of competent Civil Service Commission authorities, there exists no other evidence.

Thus the Commission's action is not supported by fact.

It should be pointed out, too, that, whatever the formal, strictly legal significance of the government's action, it amounts, in actual fact, to severe and harsh punishment for petitioner. If such punishment be administered on the ground of the San Francisco incident, then petitioner, who paid once whatever penalty society, through the California courts, prescribed, and who was ultimately declared not guilty, is being, again, further penalized by society, and in an extremely harsh manner. This is not justice as this country conceives of it.

(b) In regard to the Army Map Service accusation of falsification, no falsification occurred. No evidence

presented by respondent has shown it to have occurred. Petitioner answered, in a fashion consistent with the information he had at hand, and with the advice given him by the California probation officer, and in a manner which clearly and easily led the Civil Service Commission to the source of full information on the incident. There was plainly no attempt to conceal or to falsify.

Had petitioner intended to falsify, he would have answered question 33 on the Form 57, with "No", and would have hoped that record of the arrest would not have been discovered. But, given the present climate of suspicion and persecution, in which any admission of an incident such as this could, with certainty, be expected to be pounced upon and explored to its fullest, it would have been the height of folly and the depth of stupidity to admit the arrest and then to falsify details, which, with assurance, would have been discovered anyhow.

The Army Map Service charge was a "trumped up" one, brought in collusion with the Civil Service Commission. Petitioner was told by officers of the Map Service that he was actually being discharged because of alleged homosexuality. Petitioner was also told, by officers of the Map Service, that they had been told by officials of the Civil Service Commission, in regard to petitioner, that "If you don't get him, we will." They both did!

Factually, there is no evidence of falsification because there was no falsification. More than half of the so-called hearing granted to petitioner by the Map Service, was devoted to his alleged homosexuality, even though the charge to be examined at the hearing was falsification.

Thus, factually, both counts of respondents' case are totally unsupported. Neither immoral conduct, nor falsification occurred, respondents' allegations and accusations notwithstanding.

This alone is sufficient to invalidate the action of both the Civil Service Commission and the Army Map Service. But we have:

(2) The Argument of Procedure

Even were the Civil Service Commission's action factually supported (as it is not) however, the action is procedurally incorrect.

Respondents, thus far in this case, as it has come up through the courts, in their attempts to avoid facing squarely issues which must be faced squarely, have resorted to arguments invoking and involving adherance to proper procedure. The courts have followed along with them. But respondents have grossly violated proper procedure.

Respondents' own statement in this case (Memorandum of Points and Authorities, U. S. District Court, *supra*) as to the purposes (rehabilitation) of the Commission's debarment actions has been alluded to in Argument 1 above. If such an action is to be effective and meaningful, petitioner must be informed, formally, explicitly, and in full detail of (1) exactly and precisely that from which he is to be rehabilitated, and (2) what, in the view of the Commission, constitutes such rehabilitation.

It has been made evident, by insinuation, implication, innuendo, and deduction, since the outset of the proceedings, in 1957, that the basis for both the Civil Service Commission action, and the trumped-up Army

Map Service charge, was petitioner's alleged homosexuality. However, despite repeated requests—in fact, demands—by petitioner, he has never been explicitly and *formally* informed, by the Commission, of the nature of his alleged immoral conduct. Setting aside considerations of the degree of possibility or impossibility of such rehabilitation, petitioner cannot and could not seek or attain rehabilitation from that of which he was never informed, and of the nature of which rehabilitation itself he was also never informed. It was his right to receive such information in a formal manner. He was refused it.

It has been argued that an applicant has no right to a hearing or specification of the reason for his not being appointed. Even if this obviously invalid and grossly unjust premise were granted in general, in this case, respondents, by their statement in regard to rehabilitation as the purpose of *this* specific debarment actually invoked, have, gratuitously and at their own instigation and initiative, imposed upon themselves the necessity for having informed *this* applicant in the most explicit detail, of the nature of his alleged immoral conduct, and the nature of acceptable rehabilitation. This respondents have not done.

Thus the Civil Service Commission, by its own refusal to supply this information, formally and explicitly, has frustrated its own avowed and only purpose for its debarment action, and has, thus and thereby rendered the action necessarily futile, merely (and by its own statement, improperly) punitive, and, therefore, arbitrary and capricious.

This alone is sufficient to invalidate the Civil Service Commission's action. But we have:

THE CIVIL SERVICE COMMISSION'S FAULTY REGULATION

(3) The Argument Against the Validity of the Commission's Regulation

Even were the Commission's action factually supported, and procedurally correct (as it is not), however, the regulation under which the action is taken is invalid.

The regulation (5 C.F.R. 2.106(a)(3)) indicates, as ground for a decision of unsuitability, "immoral conduct", not further specified.

But what is immoral conduct?

Petitioner asserts, flatly, unequivocally, and absolutely uncompromisingly, that homosexuality, whether by mere inclination or by overt act, is not only not immoral, but that, for those choosing voluntarily to engage in homosexual acts, such acts are moral in a real and positive sense, and are good, right, and desirable, socially and personally. The regulation, as it stands, does not say petitioner nay to this assertion. In fact, upon examination, the regulation will be seen not to say anything at all.

Petitioner asserts that the San Francisco incident, in its entirety, did not involve or constitute immoral conduct. The regulation does not say him nay. The regulation says nothing to anyone.

A government employee is entitled to know, clearly, the regulations under which he works and is hired; a citizen is entitled to have the laws, statutes, and regulations which affect him set out in language sufficiently clear and explicit that he may know where he stands under them. This regulation is so broad and vague as to be meaningless. It cannot possibly convey to the

employee the information and guidance which such regulations should convey, and which the employee has the right to expect them to convey.

There are those, and in no negligible number, in this country, who consider dancing, drinking of alcoholic beverages in any quantity, however small, and other commonplace acts (even, in some instances the drinking of tea and coffee) as immoral. There are those who consider nothing immoral which they can "get away with". There is a very widely-held body of opinion which takes a middle-ground view that any act which does not hurt, or harm others or interfere with others against their will, is not immoral.

How is the citizen, reading this regulation to know where he stands? He cannot possibly know. The regulation is being interpreted at the whim and caprice of the Civil Service Commission officials. Will they, next year, term as immoral left-handedness, red-headedness, a liking for horse-meat steaks, or membership in either political party or in none at all?

It may be argued that that which should govern is the prevailing standard of morality in our society. But this too, is far too vague to be implemented: the standards which exist in fact, and those to which lip-service is given are often quite different. Further, this would deprive the Federal employee of his proper right to dissent in moral matters, as in all other matters. It imposes an odious conformity upon him (a point to be looked at again in Argument 6, below). Above all, and within the narrowly and sharply limited framework of this particular argument (although certainly not from the broader viewpoint of this entire petition), if the government wishes to declare particular conduct

immoral, it may do so, but it must do so in clear and explicit language, applied to particular acts considered immoral. The present regulation serves merely as a catch-all, which enables the Commission officials of the moment to indulge their personal prejudices (or those of their prejudices which they believe they can safely indulge in this context). This will be demonstrated further in Argument 6, below.

This court and others have thrown out laws relating to obscenity, because those laws were too vague and inexplicit. A less explicit regulation than this one would be hard indeed to find.

Thus the Civil Service Commission's regulation is too broad and vague to have legal weight or meaning, or to convey to the citizen any useful intelligence or to be implementable except in a totally arbitrary and capricious manner as was done here, and hence is invalid.

This alone is sufficient to invalidate the Civil Service Commission's action. But we have:

(4) The Argument Against the Constitutionality of the Civil Service Commission's Regulation

Even were the Civil Service Commission's action factually supported, and procedurally correct, and its regulation legally valid (as they are not), however, the regulation invoked here is unconstitutional under the First, Ninth, and Tenth Amendments to the Federal Constitution.

Any decision as to morality and immorality is a matter of a citizen's personal opinion and his individual religous belief.

For the Commission—or any other agency or branch of the government—to declare a course of conduct

immoral, and to act upon that declaration, is for it to attempt to tell the citizen what to think and how to believe: This the government may not do under the First Amendment to the Constitution.

Within the narrow framework of this particular argument (although certainly not from the broader viewpoint of this petition as a whole) the Commission's regulations may, if the Commission wishes, declare employees unsuitable upon grounds of homosexual acts per se, and if their nature and details are clearly specified, but it may not tell him that his acts, or any acts, are immoral.

For the government to subscribe, in this explicit fashion, to a particular definition of immoral acts is tantamount to its establishing certain religious beliefs and discarding or disowning others, and to setting up an implicit religious test for the holding of public employment. Granted that these beliefs may be those of a majority (albeit a diminishing majority) of the public, and granted that in certain cases (again, within the restricted framework of this argument only) the government may base specific law, statute and regulation upon such beliefs about morality, still, the government may not, by the First Amendment, take an explicit stand upon the immorality *itself* of certain acts.

The explicit substance and fabric of our government are written law, not morality, whatever may be the real or ostensible implicit basis beneath that law, and it is within the framework of legality and illegality, not morality and immorality, that the government must actually function. The Civil Service Commission has not done so, and is not doing so now.

Thus the Commission's regulation, as it stands, is unconstitutional, in that, by establishing a tyranny over the mind of the citizen, it is inconsistent with and violates the provisions, stipulations, spirit, and intent of the First Amendment to the Federal Constitution.

Under the Ninth Amendment to the Constitution, "the enumeration of certain rights shall not be construed to deny or disparage others retained by the people".

Under the Tenth Amendment to the Constitution, "The powers not delegated to the United States by the Constitution * * * are reserved * * * to the people."

It is indisputable that the citizen has the right and the power to decide for himself, individually, what is moral and what is immoral (as distinguished, again, from what is legal and what is illegal). Nowhere in the Constitution is Congress, or any other branch, agency, or officer of the Federal government given, directly or by implication, the power to decide what is and what is not moral and immoral.

Therefore (1) because the right of the individual citizen to decide for himself matters of morality is not explicity granted (except under the First Amendment) but is not explicitly denied, and is therefore, under all circumstances retained by him, and (2) because the power to make such decisions is not delegated to the United States, hence is reserved to the citizen, the Commission's regulation is unconstitutional in that it violates the stipulations, spirit, and intent of the Ninth and Tenth Amendments to the Federal Constitution.

This alone is sufficient to invalidate the Civil Service Commission's action. But we have:

THE CIVIL SERVICE COMMISSION'S FAULTY POLICIES

(5) The Argument That the Civil Service Commission's Policies Are Improperly Discriminatory

Even were the Civil Service Commission's actions factually supported, and procedurally correct, and its regulation legally valid and constitutional (as they are not), however, the policies underlying its action and regulation are invalid because they are arbitrarily and capriciously discriminatory.

Homosexuality, as a state of being, is not illegal in the District of Columbia, where petitioner (and a high percentage of other Federal employees) is resident (*Rittenour* v. *District of Columbia,* 163 A. 2d 558 (Mun. App. D.C. 1960)).

Further, many, if not most homosexual acts, actions, and activities (including among others, such homosexual, but not-strictly sexual acts as dancing and kissing between members of the same sex) are not illegal in the District of Columbia (Rittenour vs. D.C., *ibid;* lack of specification in D.C. Code).

However, such acts—or even the simple state of being a homosexual, or, in fact, of sharing an apartment with a homosexual—which acts residents of the District of Columbia may (legally) freely perform —or in which state they may exist—without proper official legal censure or punishment, subject the Federal employee to the severe penalties of loss of employment, loss of career, and official designation as an immoral person.

This clearly makes of the Federal employee a second-class citizen, since, upon pain of severe penalty, he may not engage, in his own time, and in his own private life, in activities in which all other citizens of the Dis-

trict of Columbia may freely and legally engage, and, in fact, he may not even arrange his life, or exist in a state legal to all residents of the District.

In addition, in July of 1960, Mr. Kimball Johnson, Chief of the Investigations Division of the Civil Service Commission, commented for newspaper publication, to the effect that the Commission's standards in sex cases were being relaxed by "* * * requiring that elements of notoriety, censure, or public scandal * * * be considered * * *", that "* * * maturity and over-all good judgment" would be applied to such cases, and that the Commission will no longer declare automatically ineligible for a Federal job a person who may have violated a state law involving morals or sex.

However, he declared (in obvious contradiction to his statement regarding the application of maturity and over-all good judgment) that "sex perverts" (presumably homosexuals, although homosexuality and perversion are not synonymous) would "continue to be fired on the spot".

The Civil Service Commission is thus granting and admitting, in effect, that an employee's sexual activity has no real bearing upon, or relationship to his suitability for Federal employment, even when that sexual activity violates the mores ostensibly adhered to by the majority of the community, and, in fact, even when that activity actually violates the law—but it is granting this only when that activity is heterosexual, not when it is homosexual. This distinction is plainly an arbitrary, capricious, and totally unreasonably one. Again, it makes of the homosexual a second-rate citizen, by discriminating against him without reasonable cause.

Thus the Civil Service Commission's policy on homosexuality is improperly discriminatory, in that it discriminates against an entire group, not considered as individuals, in a manner in which other similar groups are not discriminated against, and in that this discrimination has no basis in reason, is inconsistent with other policy and practice, and thus is plainly arbitrary and capricious.

This alone should be sufficient to invalidate the Civil Service Commission's action. But we have:

(6) The Argument of Reason

Even were respondent's actions factually supported and procedurally correct, their regulations legally valid and constitutional, and their policies properly nondiscriminatory (all of which they are not), however, the policies underlying their actions are invalid because they are neither reasonable, rational, realistic, consistent with other policy, nor in the national good or in the interest of the general welfare.

The citizen should be able to expect that the laws, regulations and policies under which he lives—particularly those which affect him individually and personally—will meet the test of reason. Not only are the Civil Service Commission's policies on homosexuality not pervaded by a discernible thread of reason, but they seem pervaded by a thread of madness. In their complete negation of the realities around us, they remind the observer of an excerpt from a nightmare of an inmate of a lunatic asylum. In their form and in their practice, they border upon, if they do not actually over-step the bounds of the psychopathic.

More important, in their being nothing more than a reflection of ancient primitive, archaic, obsolete taboos and prejudices, the policies are an incongruous, ana-

chronistic relic of the Stone Age carried over into the Space Age—and a harmful relic! Let us examine them.

Accordingly to Kinsey, Pomeroy, and Martin (Sexual Behavior in the Human Male, pp. 650 ff.) (a) 30% of *all* males, married and single, have at least incidental homosexual experience over at least a three-year period between the ages of 16 and 55, and (b) 25% have more than incidental experience.

> "In terms of averages, one male out of approximately every four has had or will have such distinct and *continued* homosexual experience." [Emphasis supplied]

(c) At least as much homosexual as heterosexual experience has been had for at least three years between the ages of 16 and 55 by 18% of the population; (d) 13% have had more homosexual experience than heterosexual; (e) 10% were more or less exclusively homosexual and (f) 8% exclusively so for a similar period; and (g) 4% are exclusively homosexual throughout their lives.

Those who are at all closely familiar with any large number of homosexuals will recognize that the majority of those certainly in the last five of the seven groups mentioned will have had far more than a mere three years homosexual experience and that the vast majority of those who have been "more or less exclusively homosexual for at least three years between ages 16 and 55" have, in fact, been more or less exclusively homosexual for the majority if not all of their adult lives.

Much more important, and very much more relevant, all seven of these groups, comprising 30% of the Amer-

ican male population, are ineligible for federal employment under present Civil Service Commission rules, policies, and regulations, as they are now administered!

That 13% having had (and, therefore likely to continue having) more homosexual experience than heterosexual is the group most intimately concerned with these policies, although the 30% (which includes this 13%) is far from unconcerned.

These figures deal with males. Female homosexuals are perhaps less well known to the populace at large, but their incidence is about as great as that of the male homosexual.

Thus we may accept as a conservative estimate, that these policies are primarily directed against some 15 or 16 million adult Americans—about 13% of our adult population —and may potentially affect up to 30%—about 35,000,000 adults.

It may be argued that only an extremely tiny percentage of this 35,000,000 and, correspondingly, only a small percentage of those accepting government positions can ever be known to the Commission, and will ever feel the force of these regulations. While this is perfectly true, it is a completely untenable position—and a totally irrational one—to hold that the validity and justification for existence of a regulation are dependent upon its limited enforceability.

In the present Federal service, with its more than 2,000,000 employees, there are thus potentially some 260,000 persons intimately affected by these regulations, and 600,000 against whom these regulations could be invoked. Whatever arguments may be brought to

bear to the effect that these policies have already winnowed out a large proportion of these (and, in point of fact, they have eliminated only a small portion of them) the number presently within the Federal service who are under the shadow of these regulations is neither small nor negligible; the number in the entire population who are discriminated against, actually or potentially, by these policies, and by them having their freedom of opportunity unreasonably, improperly, and unnecessarily reduced, is enormous.

What kind of people are these against whom our government is so viciously and uncompromisingly prejudiced?

Probably their most dominant characteristic is their utter heterogeneity. The public's image of the homosexual—like that of the Negro and of the Jew—has little relationship to reality. Depite this common popular sterotype of a homosexual which would have him discernible at once, by appearance, mannerisms and other characteristics, these people run the gamut of physical type, of intellectual ability and inclination, and of emotional make-up, with no distinguishing marks or characteristics of any sort whatever except their homosexuality itself, and no outwardly evident ones at all, common to the group. The incredible amounts of time, effort, manpower and money wasted by the various government and military investigative agencies in trying to ferret out these people, and the near-complete failure of their efforts to do so, will attest fully to the lack of distinguishing characteristics among homosexuals.

Physically the homosexual is often held to be of rather effeminate physique and mannerism. This is

true in only a small percentage of cases and, in any case, effeminacy on the part of its workers, whether of physique or of mannerism, cannot logically be shown to decrease the efficiency of either the government service or of the individual worker. The range of physical types among homosexuals is not different from that among the population at large. Three of our society's foremost cultural symbols of rampant physical masculinity are football players, truck-drivers, and members of the U. S. Marine Corps. The number of homosexual members of each of these groups is not insignificant.

Intellectually and emotionally, the homosexual group is completely heterogeneous. There are those who are brilliant, those who are dull, and a majority who lie somewhere between. There are those who are among the most stable members of the community, and those who are neurotic and psychotic, and a majority who fall somewhere between, as with the population at large. Kinsey questions (*op. cit.*, pp. 659-660) the opinion that homosexual activity in itself provides evidence of a neurotic or psychopathic personality. The average homosexual is as well-adjusted in personality as the average heterosexual. Most important, the group is as heterogeneous in these respects as in all others, hence its members must be considered as individuals, and a mass debarment of the whole group is unreasonable.

Occupationally, the group is as diverse as it is in all other respects. We find in it members of the professions—doctors, dentists, lawyers, and teachers (and their students) at all levels; of the sciences—physicists, chemists, mathematicians and others; of the arts, both the creative and the performing—writers, composers, artists, musicians, actors and others, many exceedingly

well-known; of the clergy—Protestant ministers of all sects, Catholic priests, and Jewish rabbis; of the military in all services, at all ranks from private or equivalent to general or equivalent, in very large numbers; in politics and government—at every level—federal, state, and local—in every branch—legislative, executive and judicial—both elected and appointed; in business and finance; in management and labor;—there is not an occupational group of any sort, from ditch-digger to professor, from clerk to scientist, from private citizen to holder of high office, in which homosexuals are not present in appreciable numbers.

For the Civil Service Commission to declare that all of these citizens are ineligible for Federal employment, should they wish it, for no reason other than that they are homosexuals, is clearly unreasonable.

In character traits, homosexuals, once again, are not a group. They are as honest and as dishonest, as reliable and as unreliable, as industrious and as lazy, as conscientious and as irresponsible, as liberal and as conservative, as religious and as irreligious, as much law-abiding and law-breaking as is the citizenry at large. There is no demonstrated or existing rational connection between any of these or other traits of character and personality and sexual or affectional preference.

In summary, homosexuals, outside their homosexuality, have no more in common than have red-heads outside their red-headedness, or six-footers outside their six-footedness. Homosexuality has no more relationship to competence, ability, efficiency or effectiveness than have these or other incidental traits or characteristics. It could well be argued that homosexuality

has rather less relationship to job-performance than (say) left-handedness. Job-performance is not related to the sex of one's bed-partner or to the direction of one's affections.

Thus we are forced to recognize that since there is nothing about homosexuals except their homesexuality itself upon which to attempt to rationalize the government's policies, and that since there is nothing about homosexuallty which provides such a rational basis for these policies, that the policies represent nothing more than the prejudices of the officials in the Civil Service Commission (and, perhaps, elsewhere in the government). Therefore there is no reasonable basis for barring homosexuals from Federal employment.

Having looked quickly at the group under question, and having seen no reasonable basis for debarment, let us examine the government's policies and practices in terms of the realities of the existing situation.

As much as government administrators, ostrich-like, choose not to face the facts, their discriminatory policies and practices have been statistically almost totally ineffective and, more important, will remain so.

The fact that this near-total ineffectiveness of the government's attempts to weed homosexuals out from Federal employment has not resulted in any noticeable inefficiency on this account in the government service is argument in itself against the necessity for such policies.

The lengths to which investigators go to track down those homosexuals who ultimately come to their attention is quite incredible. Nevertheless even the very government agencies engaged in the enforcement of

the various regulations aimed at the persecution of, and discrimination against homosexuals have (for all the intense investigation to which their own personnel is subjected) their own share of homosexuals. It is not irrelevant to note that a standard source of wry humor among homosexuals is the presence of homosexuals in the F.B.I., the various federal and military intelligence units and agencies, municipal vice squads, and other groups assigned often to the very task of ferreting out other homosexuals.

The Army Map Service, which was disturbed at the prospect that in hiring petitioner they might have been employing a homosexual, is not without its share of them, some of whose term of service can better be reckoned in decades rather than in years.

In fact, petitioner recently learned, informally, that Army Map Service personnel (and, therefore, perhaps, many other government employees) were informed that if, because of homosexual activities, they found themselves subjected to blackmail for espionage purposes, they should report this at once to the security officers at the Map Service; that in so doing they would not endanger their jobs; that they could not be discharged on that account. This, of course, is an eminently sane, sensible, and rational course of action on the part of the Map Service (and is closely in line with a suggestion made by petitioner to the Department of Defense in August of 1959), but it leads to the ridiculous and utterly absurd situation wherein a homosexual working at the Map Service who is indiscreet enough to get himself into a position in which he is subjected to blackmail for espionage and then admits to the authorities at the Map Service that he is a homosexual, is perfectly secure in his job and is immune to adverse

personnel action on this account, whereas the homosexual at the Map Service who never at any time comes into contact with foreign espionage agents, and may, perhaps, live a very quiet, reserved life, is subject to dismissal if his homosexuality becomes known to the Map Service. Surely this is an abandonment of all pretense at a logical, rational, reasonable, sane, consistent policy! It should also be pointed out that by so instructing its personnel, the Map Service is giving not only full recognition, but acceptance as well, to the fact that it has more than an insignificant number of homosexuals among its employees. This is hardly consistent with the bases upon which petitioner was discharged.

This is an indication, too, of the frantic, incoherent manner in which the government is thrashing around in futile efforts to seek piecemeal solutions, out of expediency, in order to avoid facing directly, coherently, systematically, and in an orderly fashion that which must be faced directly in principle, and for the facing of which the time has now arrived.

This petition is necessarily severely limited in scope and in detail, but those who are aware of more of the situation than can be dealt with here are also well aware of the manner in which the government's entire position on homosexuality, because it is completely unrealistic, unreasonable, and untenable, has deteriorated in many, many instances, out of sheer necessity, into a series of enforced, informal, unpredictable, day-to-day and instance-to-instance compromises between futile policy and unalterable reality, in which policy is usually the loser.

Those who take a realistic view of the situation know that were all homosexuals in the government simultane-

ously detected and discharged, that the various government departments—like the military in a similar situation—would dissolve into utter chaos.

It has been argued that the mere presence of homosexuals in a government (or other) office is a disruptive influence, and a cause of friction among employees. The acknowledged extreme difficulty in identifying these people effectively refutes this argument. If it were true that homosexuals constitute a disruptive influence, the undisrupted government office would be a rarity.

The perpetuation of the present policy is made possible only by the certainty of its near-complete ineffectiveness. Thus the present policy serves to cast a pall of fear over a sizable segment of the Federal work force, to wreak immense hardship upon a small but significant number, and to turn away from the government many talented people who could contribute in no small degree (Petitioner has personally spoken to many such). It accomplishes little else and nothing useful. Such a policy can hardly be said to meet the test of reason.

Although the government's policies on homosexuals have long been in effect, their present harshness, the extreme measures used to effectuate and implement them, and much of the body of administrative and investigative procedure now in existence, date back, largely, to the unfortunate, so-called "McCarthy Era", and, specifically, to the recommendations of *U.S. Senate Document No. 241*, December 15, 1950, an interim report submitted to the Committee on Expenditures in the Executive Departments, by its Sub-Committee on Investigations (the "Hoey Committee"). The docu-

ment is entitled "*Employment of Homosexuals and Other Sex Perverts in Government*". While, to a quick or uninformed reading, the contents and conclusions of this report may seem properly arrived at, supported by fact, and reasonable, a careful and informed reading will show it to be a mass of misstatement, misinformation, non sequiturs, prejudiced judgments (in the original sense of the word "prejudiced"), specious reasoning, sheer fabrication, and fallacy.

Much more important than that, however, is the subcommittee's own statement of its objectives in making its inquiry:

> "To consider why [the employment of] homosexuals by the Government is undesirable * * * *"

Not "whether", but "why"! Naturally, since, as this statement indicates, the Committee had decided, *a priori*, that the employment of homosexuals by the Government was undesirable, they would discover that it was indeed undesirable, and would supply some fallacious but superficially plausible-sounding rationalizations for their position. Equally naturally, and for reasons of the same utter lack of objectivity, those rationalizations, and the subcommittee's entire report, are not worth the paper upon which they are written. Yet, for a full decade, these rationalizations, arrived at by men with (by their own statement) closed minds, have been the guide for government policy and procedure in regard to the employment of homosexuals—as well as the basis for much vicious police activity in Washington and elsewhere in the country (e.g.: The nationwide practice of the taking of fingerprints and the sending of them to the FBI's files in cases of even the most minor of offenses, or even in cases where

individuals are detained for mere "investigation" or "suspicion", if there is the slightest overtone of homosexuality involved; and the maintenance—as by the D. C. Police Department—of extensive lists of known and suspected homosexuals, for use by the Civil Service Commission. A study of the percentage of such "arrests" for "investigation" in Washington, D. C., in which possible homosexuality was a factor might perhaps prove illuminating, as might a study of the amount of police activity and deployment of police manpower directed at simply adding names to lists of homosexuals. Much of the activity of the D. C. Police Department's so-called Morals Squad, and, in fact, according to an oral statement to petitioner by the Chief of the Squad, the very genesis of the Squad, or of its so-called perversion section, are in direct consequence of the report of the "Hoey Committee"). Policies and procedures built upon a basis such as this cannot conceivably meet the test of reason.

In the instant case, petitioner's performance at his job, by statement of his supervisors at the Army Map Service, was not merely satisfactory, but superior. His training and specialization placed him in a category in which the supply of available manpower was and is smaller, by far, than the demand. His conduct, bearing, demeanor, and deportment while at work had been impeccable. Yet, in his letter of March 12, 1958 (Ex. 9, JA, pp. 14-15) which, in petitioner's experience with official documents is unparalleled in its concentration on one page of non sequiturs, irrelevancies, and irrationalities, the Commanding Officer of the Map Service rejected petitioner's appeal on the ground that he was dismissed "to better promote the

efficiency of the Federal service." A greater departure from reason would be difficult to find!

Similarly, and for no apparent reason other than the very evident and manifest prejudices of the Civil Service Commission officials, petitioner, with no actual regard for considerations of government efficiency, was disqualified from Federal service for three years. This, too, can hardly be said to meet the test of reason.

The amount of time, effort, money, and manpower squandered in detecting and firing homosexual government employees is so great, and is so far out of proportion to any possible potential, actual, or alleged return or gain, that this alone vitiates the argument that such policies are intended to promote the efficiency of the Federal service. They contribute markedly to its inefficiency!

An essential ingredient of any rational, reasonable body of law, regulation, or policy, is its self-consistency. It is logical to expect that any such body will hang together within itself. The Government's policies on homosexuality violate such fundamental criteria of reason. Not only are the government's present policies on homosexuality irrational in themselves, but they are unreasonable in that they are grossly inconsistent with the fundamental precepts upon which this government is based, and with the entire body of its other current practices and policies, as well as with recognized national aims and goals.

We may commence with the Declaration of Independence, and its affirmation, as an "inalienable right" that of "the pursuit of happiness." Surely a most fundamental, unobjectionable, and unexceptionable element in human happiness is the right to bestow

affection upon, and to receive affection from whom one wishes. Yet, upon pain of severe penalty, the government itself would abridge this right for the homosexual. It is a rather shabby and shoddy state of affairs for a citizen's retention of his job to be dependent upon his having to choose, as an object for his affections, someone acceptable to the Civil Service Commission officials, and their henchmen elsewhere in the government. That is what the present situation boils down to. And it is indeed a petty thing when the very government of the United States stoops to attempt to regulate the social life of its employees. A re-reading, by respondents, of the Declaration of Independence, with some careful thought given to its meaning, significance, and background, would be immensely valuable to them, and of enormous good to the nation!

In November of 1960, the President's Commission on National Goals published its report. This report, if its background and origins are considered, contains what is probably as close to an official statement of what our national goals are and ought to be as any document in existence. There is much in it which is of relevance here. There is precisely equally much with which present government policy toward the homosexual is totally inconsistent.

The Report (pp. 2-4) states:

> "All our institutions * * * political, social, and economic * * * must further enhance the dignity of the citizen, promote the maximum development of his capabilities * * * and widen the range and effectiveness of opportunities for individual choice * * * *".
>
> "Respect for the individual means respect for every individual. Every man and woman must

> have equal rights before the law, and an equal opportunity to * * * hold office * * * to get a job and to be promoted when qualified * * * to participate fully in community affairs. These goals which are at the core of our system must be achieved by action at all levels."

These goals can hardly be said to have been attained by the homosexual in our society, and certainly not by the homosexual in his dealings, on any basis or level, with his government. The government is acting vigorously and properly to secure to the Negro his civil rights; but it is acting equally vigorously to deprive the homosexual of his civil rights.

The Report states further (p. 3):

> "The great ideas that have moved the world have sprung from unfettered human minds. The spirit of liberty in which they thrive makes one man hesitate to impose his will upon another * * * "

The Civil Service Commission's policies can certainly not be said to be conducive to liberty.

> "The notion that ideas and individuals must be rejected because they are controversial denies the essence of our tradition."

But such rejection is precisely what is occurring in this case.

Donald Webster Cory (*The Homosexual in America*) points out that in the ranks of homosexuals we have (among many, many others) Plato, Socrates, Julius Caesar, Marlowe, Francis Bacon, Leonardo da Vinci, Michaelangelo, Goethe, Verlaine, Rimbaud, Baudelaire, Tschaikowsky, Nijinsky, Gide, Hans Christian Anderson, Proust, Whitman * * *. We would be sadly the

poorer, in many ways without the contributions of these men.

There is every reason to believe that a similarly stellar list could be compiled from amongst our contemporaries. The government would have us reject all of them, as those in the past would have been, had their employment come within the purview of our present government.

The Commission's Report continues (p. 3):

> "There are subtle and powerful pressures toward conformity in the economic, social and political world. They must be resisted so that differences of taste [!] and opinion will remain a constructive force in improving our society".

These entire proceedings, from the Civil Service Commission regulation through its administration and the consequent adverse personnel actions, to respondents' courtroom arguments, are a classic, textbook exercise in the imposition of conformity for the sake of nothing else than conformity, and of the rigorous suppression of dissent, difference, and non-conformity. They represent stubborn insistence upon conformity to irrational prejudice and bias for no reason than that the prejudice and bias exist in places in the nation and on the part of certain officials, presumably some of those formulating and administering these regulations and pursuing these proceedings.

The Report states (p. 3):

> "Vigorous controversy and the acceptance of dissent as a positive value will remain our strength and demonstrate to the world our calm confidence that truth and reason prevail in a free society".

In the sheer ferocity of its pursuit of homosexuals, the government could not possibly be farther from calm confidence (blind unreasoning hysteria would be a more apt description) or from the pursuit of truth and reason, or from the maintenance of a free society. In this field, dissent is suppressed to the point where it was indicated to petitioner, by government officials, that (1) even to take a civilizedly tolerant or unprejudiced attitude toward homosexuals and homosexuality would be enough to place a Federal employee under suspicion and lead to his being considered unsuitable, and (2) that petitioner's utterance of his perfectly proper, if controversial and dissenting view that a Federal employee's personal, outside-of-working-hours life was "none of the Civil Service Commission's business" was looked upon as a heresy, and as a near-heinous crime, to which the Commission's officials objected quite as much as they did to what they believed to be the nature of his private life.

Our government exists to protect and assist *all* of its citizens, not, as in the case of homosexuals, to harm, to victimize, and to destroy them. Unfortunately, much of that portion of our present-day Federal bureaucracy which deals with the citizenry personally, has lost sight of this, and seems to look upon it as the goal of the good public servant to "get" as many citizens as possible. Insensately single-minded, they pursue their narrow, savage, backward policies, paying no heed to the needless havoc wrought upon the hapless citizens who are their victims. This is certainly true of portions of the Civil Service Commission staff, and it was certainly true in this case. This is obviously inconsistent with the basic principles upon which our government is said to rest.

On page 4 of the Report, we read that:

> "Habits of prejudice and fear of social and economic pressure restrict employment opportunities * * *. No American should remain within the grip of these habits and fears."

Yet the very government itself, in the case of the homosexual, is one of the prime instigators and perpetuators of such habits of prejudice and of such fears; it has whipped them up rather than ameliorated them. The government has succumbed, ignominiously, to ignorance, outworn prejudice, and idle superstition.

Perhaps most important, we read (page 4 of the Report) that:

> "One role of government is to stimulate changes of attitude".

In fields of anti-Negro, anti-Semitic, anti-Catholic, and other prejudice, the government has indeed recognized, and is playing fully and admirably its role as a leader of changes in attitude. In regard to the homosexual, the government is following—and following abjectly—an example of prejudice of the least admirable kind, with no effort to change its own attitude, much less to stimulate changes of attitude elsewhere.

In the summer of 1960, Mr. Kimball Johnson, Chief of the Investigations Division of the Civil Service Commission, in publicly enunciating Commission policy, stated that

> sex perverts will continue to be fired on the spot. The public would not condone any modification of CSC's rigid standards in handling such cases.

But the public did not condone integration in Little Rock, in New Orleans, in the armed forces, and elsewhere. By court order and force of Federal troops, the public was made to accept it, willy-nilly, with or without condonation.

There will be no riots in the streets if homosexuals are no longer fired from the government service; no government buildings will be blown up; there will be no need to call out troops to protect Federal employees; there will be no mass resignations or boycotts of the Federal service, or any other signs of protest analogous to those occurring in the South in regard to racial integration.

Yet the government will act against strongly (and violently) expressed public opinion in support of one minority, but will not act to support another minority, equally large and no less deserving, against what is little more than the government's own presumption of what the strength of public opinion might be.

There is no more reason or need for a citizen's sexual tastes or habits to conform to those of the majority than there is for his gastronomic ones to do so, and there is certainly no rational basis for making his employment, whether private or by the government, contingent upon such conformity.

Petitioner happens to enjoy horse meat steaks, a taste shared with him by a small number of fellow Americans, a taste against which most Americans are strongly prejudiced and will not condone (to the extent that the sale of such meat is prohibited in some cities) and which inspires repugnance and revulsion in large numbers of citizens, a taste which is legal, a taste which relates to his own personal life, and a taste which has

nothing to do with the practice of Astronomy. Will the Civil Service Commission find him unsuitable to work as an Astronomer because of his taste, uncondoned by the public? Most unlikely. Yet, on the ground that he is a homosexual—a taste shared by a far higher number of citizens than one for horse-meat, one which is legal, one which relates to his private life only, and one equally irrelevant to the practice of Astronomy, the Commission considers him disqualified to work as an Astronomer. Where is the reason, the logic, or the consistency in this? There is none.

It should be noted, too, that Mr. Johnson's statement shows clearly the complete falsity of the professed high-sounding reasons given by the Civil Service Commission (efficiency of the Federal service, etc.) to justify their position. As this statement indicates, their entire policy upon homosexuals is based upon supine, unresisting submission to what they consider to be popular prejudice.

Finally, Mr. Johnson's statement is flatly incorrect. It would be folly to deny that anti-homosexual prejudice exists, and exists strongly—the government itself is one of the best-defended strongholds of such prejudice. But the public's utter and complete lack of tolerance, implied in Mr. Johnson's statement does not exist. While numerous other instances could be cited (e.g. editorials in the Washington Post in the summer and autumn of 1960), one example in particular, which will serve, is Robert W. Wood's *"Christ and the Homosexual"*. Here is a book written by a Congregational minister, apparently with the support of the members of his church. The book is a denunciation of the condemnation and persecution of homosexuals by Christians, often in the name of religion. It seeks

to demonstrate that homosexual practices are not inconsistent with the practice of and belief in Christianity. The point need not be belabored further. If a book such as this one (and it is but one of several) may be written under these circumstances by such an author, then Mr. Johnson's statement holds no water; present Civil Service Commission policies are based upon assumptions inconsistent with present reality.

The government's policy in regard to homosexuals is thus totally inconsistent with its policies in regard to other large minority groups, and is also thoroughly inconsistent with the proper role of the government to stimulate and lead in changes of public attitude.

On page 8 of the Report, we read:

> "We must use available manpower more efficiently. The practice of wasting highly trained people in jobs below their capacity * * * must be eliminated."

The Civil Service Commission seems to be operating upon an economy of plenty in regard to trained manpower. It is widely recognized that the country is operating in an economy of scarcity. And yet, while, on the one hand, the government laments the shortage of technically trained personnel, on the other hand the Commission promiscuously discharges talented, trained—often highly trained—and highly competent personnel, frequently scarce and in the highest of demand and (as petitioner knows through personal conversation with physicists, mathematicians, and others) discourages the service of many others, upon the flimsy basis of its disapproval of the manner in which they conduct their personal lives. It would seem that the government's left hand does not know what its right hand is doing. And the manner in which the

Commission pursues its policies in this regard leads, often, to the complete professional destruction of the individuals involved, with a total loss to society and country, of their abilities and training—a loss which in its extent, is appalling, and is, of course, totally unnecessary. It would indeed be difficult to conceive of a more wanton and senseless waste of valuable and vitally-needed human resources.

Thus the Commission's policies and practices, both in general, and in the instant case, are grossly inconsistent with recognized national goals and desiderata in regard to the use of manpower and intellect.

The Civil Service Commission's policies can be looked upon as a restriction upon freedom of association. Since, in the District of Columbia, many, if not most homosexual acts are not illegal, nor is it illegal simply to be a homosexual (*Rittenour* v. *D. C.*, *supra*), and since the Commission does not consider as automatically ineligible for Federal employment citizens who may have violated state laws (differing from those of the District of Columbia) on sexual matters, their policies reduce to an attempt to control an employee's associates and the nature of his association with those associates.

The United States long ago disowned and abandoned slavery, peonage, and serfdom. Yet what else can one term an attempt by an employer to control an employee's life, acts, and associations during his own time, in ways which have no slightest relevance to his professional fitness, or personal performance or competence at his job? In hiring an employee, the government—or any employer in this country, for that matter—does not buy him, and own him, body and soul. The

government's policies would seem to indicate that it is not convinced of this.

In its role as an employer, the government's only proper concern is with the employee's work and conduct during working hours, not at other times. It is not for the government-as-employer to attempt to intercede in the employee's private affairs. These are matters between the employee himself and his conscience, and between him and his associates in such private life, but not between him and his employer.

Respondents' policies are therefore inconsistent with this country's long-standing policies and traditions upon individual freedom of association and action.

Thus the government's policies and practices in regard to homosexuals stand unique and alone in being totally inconsistent with all other policies, practices, aims and goals of the nation, as well as being totally inconsistent with the most fundamental precepts of human and individual freedom and liberty, upon which this nation was founded, upon which it continues to exist, and as the defender of which it stands before the world. Being inconsistent in this way, and having been shown to have nothing else to justify them, these policies fail the test of reason.

In summary, then, the government's entire policy on homosexuals, and its practices, procedures, and regulations, and the cliches used to justify them, represent a complete abandonment of, and abdication from reason. This entire set of policies and practices is fraught with inconsistencies and irrationalities, and, by no stretch of imagination or pretense at the use of intellect, can they be said even to approach meeting the tests of reason, or of the promotion of the general

welfare, as prescribed in the Preamble to the Federal Constitution. Quite to the contrary, they violate all reason, and are strongly antagonistic to the interest of the general welfare.

This alone should be sufficient to bring respondents' actions at issue into the strongest, fullest, and most searching of question before the courts. But we have:

(7) The Argument Against the Constitutionality of the Civil Service Commission's Policies and Practices

Even were respondents' actions factually supported and procedurally correct, their regulations legally valid and constitutional, and their policies properly non-discriminatory, and capable of meeting the test of reason (all of which they are not), however, the Commission's action is invalid because it itself, and the policies upon which it is based are unconstitutional under the Fifth Amendment to the Federal Constitution.

The Civil Service Commission, by its policies, seeks to limit the freedom of action of an employee, in a fashion which, as has been shown in the argument preceding, is arbitrary and without basis in reason or in relevance to any possible proper objectives of the Commission or of the government.

The Commission's policies against the employment of homosexuals constitute a discrimination no less illegal and no less odious than discrimination based upon religious or racial grounds, a personal discrimination which is, to borrow a phrase from *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) "so unjustifiable as to be violative of due process."

Both the Civil Service Commission action and the Army Map Service action are based upon the mere

suspicion that petitioner's sexual activities and the direction of his affections may be different from those of the majority of citizens (Petitioner's arguments and position in this petition would in no slightest degree be altered, were that suspicion proven unquestionably correct).

In *Bolling* v. *Sharpe, supra*, this Court has said:

> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

In this case, respondent is depriving petitioner of his liberty, under law, to compete for, accept, and hold government employment on the same basis as other citizens of the United States. No proper, reasonable governmental objective has been shown in this restriction, nor, by Argument 6 above, is it likely that any can be shown.

This argument applies, too, to the Army Map Service action. Petitioner was informed (Letter of December 10, 1957) that had the Map Service had full details of the arrest, he "might not have been considered for appointment by this agency". (Ex. 1, JA, p. 7) In view of the fact that, however arrived at, the final verdict was "Not Guilty", this can mean only that the true basis for the Map Service action was identical with that for the Civil Service Commission action—solely and only a suspicion of homosexuality (As mentioned above, this was verified in conversation between petitioner and Map Service personnel officers, and is attested to by the content of the "hearing" of December 23, 1957

before Map Service officials). Here too, a flat disqualification and a dismissal for homosexuality are deprivation of both liberty and property without due process of law.

The Supreme Court has held (*Bolling* v. *Sharpe*, *supra*), that "* * * equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." It follows that when a Federal agency's decision is challenged as personally discriminatory in violation of the due process clause of the Fifth Amendment, the courts must satisfy themselves, by going behind the agency finding to see whether it is without substantial support.

Hence respondents' actions in this case, and the policies upon which they are based, by which homosexuals are barred from Federal employment, are unconstitutional in that they violate the due process clause of the Fifth Amendment.

This alone is sufficient to invalidate the actions of both the Civil Service Commission and the Army Map Service.

SUMMARY OF ARGUMENTS

Respondents' case is rotten to the core. Respondents' case has been shown to fail factually and to be defective procedurally; the regulations upon which they base their case have been shown to be legally faulty, invalid, and unconstitutional; their policies have been shown to be improperly discriminatory, irrational and unreasonable, inconsistent and against the general welfare, and unconstitutional. The entire bases for respondents' actions in this and in similar cases have been shown to be arbitrary, capricious and without reasonable foundation.

Genuine issues of fact have been raised, as well as issues of law and statute, which are of deep concern to at least some 15,000,000 citizens, and possibly twice that number or more. These issues are of sufficient weight and gravity to warrant their being heard in full by the courts.

The government's regulations, policies, practices and procedures, as applied in the instant case to petitioner specifically, and as applied to homosexuals generally, are a stench in the nostrils of decent people, an offense against morality, an abandonment of reason, an affront to human dignity, an improper restraint upon proper freedom and liberty, a disgrace to any civilized society, and a violation of all that this nation stands for. These policies, practices, procedures, and regulations have gone too long unquestioned, and too long unexamined by the courts.

The government's entire set of policies and practices in this field is bankrupt, and needs a searching re-assessment and re-evaluation—a re-assessment and re-evaluation which will never occur until these matters are forced into the light of day by a full court hearing, such as is requested by this petition.

The time has come for the government to turn over a new leaf—nay, to open a new volume—in its treatment and handling of this question and of the citizens involved. This might well be achieved by this court by the simple expedient of granting petitioner his writ of certiorari.

CONCLUSION

For the foregoing reasons, set out in detail above; in the interest of justice for petitioner personally, and in order that he may pursue his fight for his proper

rights, freedoms and liberties, and for his career, his profession, his livelihood, his chance to contribute to society to the fullest extent of his ability, and his good name, against infamous, tyrannical, immoral and odious actions of his government; in the interest of the public at large and of the nation as a whole; and in the particular interest of a large minority of the citizenry, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANKLIN E. KAMENY
Pro se

January 27, 1961

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1628-59

FRANKLIN EDWARD KAMENY, *Plaintiff*

v.

HONORABLE WILBER M. BRUCKER, Secretary of the Army, et al., *Defendants*

Order

Upon consideration of defendants' Motion for Summary Judgment and plaintiff's opposition thereto, and the Court having considered the pleadings, affidavit, and exhibits, and after argument by the parties in open Court, and the Court having determined that there is no genuine issue of material fact and defendants are entitled to judgment herein as a matter of law, it is this 28th day of December, 1959,

ORDERED that defendants' Motion for Summary Judgment be and the same is granted and the complaint dismissed.

s/ MATTHEWS
Judge

Opinion

Decided June 23, 1960

Mr. Byron N. Scott for appellant.

Mr. Daniel J. McTague, Assistant United States Attorney, for appellee. *Messrs. Oliver Gasch,* United States Attorney, *Carl W. Belcher* and *Miss Doris H. Spangenburg,* Assistant United States Attorneys, were on the brief for appellee.

Before WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges.*

PER CURIAM: Appellant sought a mandatory injunction commanding his reinstatement to a position as astronomer

in the Army Map Service. The appellees moved for, and the District Court granted, summary judgment, and the complaint was dismissed. This appeal followed.

Before the District Court were certified copies of the records of the Department of the Army and of the Civil Service Commission. The appellant, as of July 15, 1957, having received a temporary appointment such as is authorized by 5 C.F.R. § 2.302 (Supp. 1960), came within 5 C.F.R. § 2.107(a) (Supp. 1960), which provides for appointments "subject to investigation . . . to establish the appointee's qualifications and suitability for employment in the competitive service." Less than six months later, as of December 10, 1957, appellant was advised that the appointing authority proposed to effectuate appellant's removal on December 20, 1957. In addition, specific details were supplied from which the appellant was put on notice as to the basis for the contemplated separation from service. He was advised of his right to answer the notice of the proposed adverse action "personally, and in writing, and to submit any and all evidence you may desire." Under date of December 11, 1957, appellant filed a sworn answer, after which, by letter dated December 20, 1957, he was further notified that careful consideration had been given to the charges and to appellant's reply, notwithstanding which his removal was to be effectuated as of December 20, 1957. He was advised of a right to appeal "through the grievance procedure outlined in Civilian Personnel Regulations E-2." Appellant contends that he was not given a "hearing" under that section, but none is required, as it is provided only that a hearing "may be held at the commanding officer's discretion." Even so, appellant presented an oral statement before the Commanding Officer and the Civilian Personnel Officer of the Army Map Service, and was thereupon given an opportunity further to present in writing, subject to review, such additional explanation as appellant might chose to submit.

Appellant accordingly submitted a lengthy memorandum setting forth his position in its best light; he filed three character affidavits and a statement from his psychiatrist. Some weeks later appellant was informed that after careful review of all the proceedings and the evidence available, the December 20, 1957 notice of separation "was considered justifiable to better promote the efficiency of the Federal service and no action will be taken to reinstate you to your former position."

5 C.F.R. § 9.104 (Supp. 1960) provides that "An employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer."

We are satisfied that the latter accorded to the appellant all procedural prerogatives required to be extended in the case of temporary appointees, and that valid regulations of the Civil Service Commission authorized appellant's separation from the service. *Hargett* v. *Summerfield*, 100 U.S.App.D.C. 85, 243 F.2d 29, *cert. denied*, 353 U.S. 970 (1957); cf. *Kohlberg* v. *Gray*, 93 U.S.App. D.C. 97, 207 F.2d 35 (1953), *cert. denied*, 346 U.S. 937 (1954); *Jason* v. *Summerfield*, 94 U.S.App.D.C. 197, 201, 214 F.2d 273, 277, *cert. denied*, 348 U.S. 840 (1954).

Our decision on this aspect of the case makes it unnecessary for us to consider appellant's contentions with reference to the conclusions reached by the Civil Service Commission.

The order of the District Court is

Affirmed.

Order

Upon consideration of appellant's petition for leave to file a petition for rehearing, time havin expired, and it appearing that appellant's petition for rehearing has been lodged with the Clerk and that appellees have no objection to the filing of the petition for rehearing, it is

ORDERED by the court that the Clerk is directed to file appellant's petition for rehearing.

It is FURTHER ORDERED by the court that appellant's petition for rehearing is denied.

Per Curiam.

Dated: August 31, 1960

No. 676

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANKLIN EDWARD KAMENY, *Petitioner*

v.

WILBER M. BRUCKER, SECRETARY OF THE ARMY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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FRANKLIN EDWARD KAMENY, *Petitioner*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court for the District of Columbia did not enter an opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-3a) is reported at 282 F. 2d 823. The order of the Court of Appeals denying the petition for rehearing (Pet. App. 4a) was entered without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1960. The order of the Court of Appeals denying the petition for rehearing was entered on August 31, 1960. On November 18, 1960, the Chief Justice extended the time for filing the petition for a writ of certiorari to and including January 28, 1961. The petition for a writ of certiorari was filed on January 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the applicable procedural safeguards were observed where the Department of the Army removed petitioner from his position as a temporary employee and the Civil Service Commission disqualified him from a competitive position for three years.

REGULATIONS INVOLVED

The pertinent Civil Service regulations are set forth in the petition, pp. 3-5.

STATEMENT

Petitioner filed suit in the District Court seeking reinstatement to his position as an astronomer with the Army Map Service and declaratory relief from an order of the Civil Service Commission disqualifying petitioner from an appointment in the competitive federal service for a period of three years (J.A. 2-6).[1] The District Court granted respondents'[2] motion for

[1] "J.A." refers to the joint appendix filed in the court below.

[2] Petitioner named as defendants, in addition to Secretary of the Army Brucker, the three Civil Service Commissioners.

summary judgment, and, on appeal, the Court of Appeals affirmed. The pertinent facts are as follows:

1. On July 15, 1957, petitioner received a temporary appointment as an astronomer, grade GS-9, in the Army Map Service of the Department of the Army (Def. Exhibit 11 To Motion for Summary Judgment). Less than six months later, on December 10, 1957, pursuant to an agency investigation, petitioner was advised that the appointing authority proposed to remove him on December 20, 1957 (J.A. 7). The basis for removal given in the letter to petitioner was that he had falsified "official government documents in connection with [his] employment at the Army Map Service" (J.A. 7).

In support of this charge, the letter proposing removal stated that petitioner had "failed to furnish a completely truthful answer" to a question on his Form 57 applicable for employment, which petitioner had filled out on June 23, 1957[3] (J.A. 7-8). In reply to a question on that form asking about the nature of prior arrests, including the charge and action taken (J.A. 15), petitioner had answered that he had been arrested in August 1956 in San Francisco and charged with disorderly conduct, and that he had been found not guilty and the charge dismissed (J.A. 15-16). In actuality, however, as noted in the letter proposing removal, petitioner had been arrested by Inspectors of the Sex Detail in San Francisco, charged with "Viola-

[3] Petitioner was informed on the Form 57 that the information he gave thereon would be subject to investigation, and that, in determining his fitness for employment, a "false statement or dishonest answer" to any question would be taken into account and might even constitute grounds for dismissal (J.A. 16).

tion of Section 215 Police Code (Lewd and Indecent Acts)," pleaded guilty, paid a fine, and been put on probation for six months (J.A. 7-8, 17-18).[4]

The letter proposing removal further advised petitioner of his right to answer the notice of proposed adverse action personally and in writing, and to submit any and all evidence he might deem necessary within three days from receipt of the notice (J.A. 8). He was also informed that all regulations and records that he might require would be available to him in the Civilian Personnel Office and that he would be continued on work status during the advance notice period (J.A. 8).

In a letter dated December 11, 1957, petitioner replied to the charge, asserting that to the best of his knowledge and belief the statements on his Form 57 were true (J.A. 10-12). By letter dated December 20, 1957, the Civilian Personnel Officer, acting for the Commander, advised petitioner that, after careful consideration of the charge specified in the letter of proposed removal, and of petitioner's reply, it had been decided to sustain the charge, and petitioner's removal would be effective as of December 20 (J.A. 12-13). Petitioner was informed that he had a right to appeal the decision, through the grievance procedure outlined in Civilian Personnel Regulation E-2,[5] within ten work

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[4] Petitioner successfully complied with the conditions of this probation, and, pursuant to California law, his plea of guilty was then set aside, a plea of not guilty entered, and the case dismissed (J.A. 9).

[5] This regulation of the Department of the Army provided in pertinent part:

> Complaints or grievances arising from the following types of decisions or actions will be processed under these regula-

days from the date of the letter (J.A. 12-13). Attached to the letter of removal was a Department of the Army Notification of Personnel Action stating that the removal was based on the "falsification of * * * documents in connection with * * * employment * * *" (J.A. 12-13).

On December 23, 1957, petitioner appeared before Commanding Colonel F. O. Diereks and the Civilian Personnel Officer and presented an oral statement explaining his failure to list more complete information on his Form 57 (Def. Exhibit 8 to the Motion for Summary Judgment). After listening to his explanation, Colonel Diereks stated that he desired to have the information presented in writing for his personal review (*ibid.*). On January 14, 1958, petitioner submitted a lengthy memorandum, in compliance with the request, and also filed three character affidavits, a biographical statement, and, later, a statement from his psychiatrist (Def. Exhibits 7 and 7a to the Motion for Summary Judgment).

By letter dated March 12, 1958, Colonel Diereks advised petitioner that he had failed to show that he was unaware of the exact nature of the charge and action taken in connection with his arrest in San Francisco. As a result, and "after careful review" of the entire

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tions with authority for final action vested in the commanding officer. Hearings may be held at the commanding officer's discretion, but the employee concerned will not be entitled to request a review, except as provided * * * below.

(1) Separations, initiated by the appointing officer, of employees serving probationary or trial periods, who fail to demonstrate their qualifications for the job, or who manifest attributes which indicate unsuitability for Federal employment, or who fail to meet minimum eligibility standards for appointment * * *

matter concerning the falsification on the Form 57, the removal action was upheld (J.A. 15).

2. Prior to the agency letter proposing removal, the Civil Service Commission, pursuant to its regulations concerning temporary appointments such as petitioner's, had commenced an investigation into petitioner's suitability and fitness for service. On November 26, 1957, during the course of an interview by a Commission investigator, petitioner was asked questions with respect to the San Francisco arrest and also with respect to certain information brought to the Commission's attention that petitioner was a homosexual (J.A. 22-24). While answering certain questions in part, petitioner generally declined to offer any comments on the questions concerning his alleged homosexuality (J.A. 22-24). He later submitted a brief statement to the Commission that he had never done anything immoral and that he should be retained in his position for the good of the government (J.A. 29-30). On December 25, 1957, in another interview with a Commission investigator, petitioner was invited to submit additional evidence or statements on his own behalf, but he declined to discuss the matter raised in the first interview (J.A. 26-29).

On January 15, 1958, petitioner received a letter from the Chief of the Investigations Division of the Civil Service Commission, in which he was informed that, based on the entire investigation, the statements he had made, and his general refusal to discuss other questions, the Commission had concluded that petitioner was "disqualified for employment in the competitive Federal service under the provisions of Section 2.106 of the Civil Service Regulations because of

immoral conduct" (J.A. 34-35). The letter also advised petitioner that he was "barred from competing in examinations for or accepting appointments to positions in the competitive Federal service for a period of three years" (*ibid.*). Finally, the letter pointed out petitioner's right to appeal.

On February 14, 1958, petitioner filed a lengthy statement of appeal with the Civil Service Commission (Def. Exhibit 15 to the Motion for Summary Judgment). On March 17, 1958, the Chairman of the Board of Appeals and Review informed petitioner by letter that the action of the Investigations Division was affirmed (J.A. 33-34). The Board had concluded that, after weighing all the statements and evidence, the action of disqualification was warranted under the immoral conduct standard of unsuitability, as provided in 5 C.F.R. 2.106(3). Thereafter, petitioner prosecuted one final administrative appeal to the Chairman of the Civil Service Commission, who, by letter of May 15, 1958, advised him that, after consideration of the record, the Commissioners had found no reason to reopen the matter, and that the decision of the Board of Appeals and Review constituted the final decision of the Commission (J.A. 32).

After unsuccessfully seeking reinstatement and declaratory relief in the District Court, which granted the respondents' motion for summary judgment without opinion, petitioner appealed to the court below. That court affirmed, *per curiam*, holding that petitioner had been given all the procedural protections to which he was entitled as a temporary appointee (Pet. App. 2a-3a). Having so ruled, the court declined to go into the merits of the conclusions reached in effec-

tuating petitioner's removal and disqualification (Pet. App. 3a).

ARGUMENT

1. As a temporary appointee subject to investigation as to qualification and fitness for federal service, petitioner was accorded, in both the removal and disqualification actions, the full procedural protections provided by the applicable regulations. The removal action initiated by the Army, well within the period provided for investigation, was based on the charge of falsification of petitioner's employment application. Petitioner had been allowed to reply to the charge fully, and to appear at a special hearing.[6] The disqualification from competitive federal service for three years by the Civil Service Commission, as a result of its conclusion of immoral conduct in petitioner's case, similarly was accomplished in complete accord with the Commission's own regulations for employees of petitioner's status. As a temporary employee, whose qualifications had to be determined after commencement of what constituted a conditional appointment, petitioner cannot point to any violation of the applicable procedural standards. Cf. *Kirkpatrick* v. *Gray*, 198 F. 2d 533 (C.A. D.C.), certiorari denied, 344 U.S. 880; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A. D.C.), certiorari denied, 346 U.S. 937.

2. Petitioner does not seriously contend that there has been any lack of procedural regularity in effecting

[6] As the court below noted, no hearing was required in the case of a temporary employee (Pet. App. 2a). See Civilian Personnel Regulation E-2, fn. 5, *supra*, pp. 4-5, 5 C.F.R. 9.104 (Pet. 5) provides that "[a]n employee serving under a temporary appointment may be separated at any time upon notice in writing from the appointing officer."

his removal and disqualification but relies essentially on a challenge to the reasons or justification behind the actions taken in his case. The short answer here, of course, as noted by the court below, is that the courts do not go beyond the question of substantial procedural compliance in employee discharge cases but leave the substantive basis for removal to the discretion of the employing agency. *E.g., Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A. D.C.), certiorari denied, 353 U.S. 970; *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A. D.C.); *Keyton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[7]

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[7] The petition, which extends to 60 pages, should also be denied because of its plain violation of the requirement of brevity in Rule 23(4) of the Rules of this Court.

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